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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: .12.2004

CORAM

THE HONOURABLE MRS. ***JUSTICE R.BANUMATHI***

CRL.APPEAL No.14 of 1998

M.Thiagarajan ... Appellant / Complainant

Vs.

M.Maruthachalam ... Respondent / Accused

This Criminal Appeal arises against the Judgment dated 17.10.1997 made in C.C.No.7084 of 1996 on the file of IX Metropolitan Magistrate, Saidapet, Chennai.

For Appellant : Mr.V.Padmanabhan

For Respondent : Mr.H.Balamurugan, for Mr.K.Raju

J U D G M E N T

Aggrieved over the dismissal of his complaint acquitting the Accused under S.255 (1) Crl.P.C. in C.C.No.7084 of 1996 by the IX Metropolitan Magistrate, Saidapet, Chennai by the order dated 17.10.1997, the Complainant has preferred this appeal.

2. Case of the Complainant is that the accused borrowed money for his business purpose from the Complainant. In discharge of his part liability, the accused had issued Cheque bearing No.453120 dated 17.09.1996 for a sum of Rs.1,00,000/- drawn on State Bank of India, Anna University Branch, Chennai. When the Cheque

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was presented for collection on 19.10.1996, the same was returned dishonoured for "Insufficiency of Funds" on the same day. The Complainant had issued notice of demand dated: 28.10.1996, which was received by the accused on 30.10.1996. Despite receipt of the notice by the accused, the accused did not pay the money due. Hence the Complainant has filed the complaint under S.138 of Negotiable Instruments Act.

3. The Complaint was taken on file on 16.12.1996 and was adjourned to various dates. On 17.10.1997, the Complainant was absent. On his behalf, petition was filed under S.256 Crl.P.C., for condoning his absence. The learned Magistrate has allowed the petition filed under S.256 Crl.P.C.; but has dismissed the complaint acquitting the accused under S.255 (1) Crl.P.C.

4. Aggrieved over the dismissal of the complaint, the Appellant / Complainant has preferred this appeal. Assailing the impugned order, learned counsel for the Appellant / Complainant has submitted that having condoned the absence of the Complainant under S.256 Crl.P.C., the learned Magistrate ought not to have dismissed the Complaint acquitting the accused under S.255 (1) Crl.P.C. It is contended that S.255 Crl.P.C. is attracted only on the evidence recorded and when no evidence has been recorded, recording of acquittal under S.255 (1) Crl.P.C. suffers from serious error warranting interference. Submitting that the discretion under S.256 Crl.P.C. is to be judiciously exercised, reliance has been placed upon ***A.I.R. 1998 SUPREME COURT 596 – Associated Cement Co. Ltd. v. Keshvanand.***

5. Countering the arguments, onbehalf of the Respondent / Accused, it is submitted that when the Complainant had not adduced the evidence and had no intention to get along with the case, the trial Court has rightly acquitted the Respondent / Accused under S.255 (1) Crl.P.C. and that the order does not suffer from any error and the same cannot be interfered with.

6. In consideration of the impugned order and the submissions of both sides, two points arise for consideration in this appeal:-

(i) Having condoned the absence of the Appellant / Complainant, was the trial Magistrate justified in dismissing the complaint and recording the acquittal under S.255 (1) Crl.P.C. ?

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(ii) Whether the order of acquittal under S.255 (1) Crl.P.C. suffers from any serious error warranting interference ?

7. A peculiar situation has arisen in this case leading to serious error of law. The complaint was taken on file on 16.12.1996. From then onwards, the case was adjourned to 22.01.1997, 19.02.1997, 19.03.1997, 10.04.1997, 06.05.1997, 03.06.1997, 09.06.1997, 04.07.1997, 08.08.1997 and 12.09.1997. On these hearing dates, either the Appellant / Complainant was present or his personal appearance has been dispensed with on filing application under S.256 Crl.P.C. Likewise on those hearing dates, either the Respondent / Accused was present or his personal appearance was dispensed with by allowing the petition filed under S.317 Crl.P.C. On 19.02.1997, there was no representation for the accused. Hence Non Bailable Warrant was issued against him. When Non Bailable Warrant was pending, on petition filed by the accused, Non Bailable Warrant was ordered to be recalled. Thus the learned trial Magistrate was repeatedly adjourning the case for giving opportunity to the Complainant for adducing evidence.

8. The case was posted on 17.10.1997. On that date, petition in Crl.M.P.No.4642 of 1997 was filed under S.256 Crl.P.C. stating that " the Complainant has gone to Sabarimalai and hence he is not able to appear before the Court ". The petition was allowed dispensing the personal appearance of the Complainant. Having dispensed with the personal appearance of the Complainant, the learned Magistrate has simultaneously acquitted the accused having recourse to S.255 (1) Crl.P.C. The impugned order reads thus:-

" வாதி ஆஜரில்லை. கு.வி.மு.ச. 256வது பிரிவின் கீழ் மனு தாக்கல் செய்து அனுமதிக்கப்பட்டுள்ளது. எதிரி ஆஜர். வழக்கு 16.12.96ம் தேதியிலிருந்து நிலுவையிலிருந்து வருகிறது. வாதி தரப்பில் சாட்சிகளை ஆஜர் செய்து விசாரணை செய்யவில்லை. 8.8.97ந் தேதியிலிருந்து வழக்கு ஒத்தி வைக்கப்பட்டு, வாதி தரப்பில் சாட்சிகளை ஆஜர் செய்யவில்லை. வழக்கு 18.9.97ந் தேதிக்கு ஒத்தி வைத்தும் சாட்சிகளை ஆஜர் செய்யவில்லை. சாட்சிகளை ஆஜர் செய்வதற்கு வழக்கு இறுதியாக இன்று (17.10.97) ஒத்தி வைத்தும் வாதி ஆஜராகவில்லை. வாதி தரப்பில் சாட்சிகளையும் ஆஜர் செய்யவில்லை. எதிரி மீது தாக்கல்செய்யப்பட்ட குற்றம் உண்மையாக இருந்தால் வாதி தரப்பில் சாட்சிகளை ஆஜர் செய்து குற்றத்தை நிரூபித்திருப்பார். சாட்சிகளை ஆஜர் செய்யாததை

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வைத்து எதிரி மீதுள்ள குற்றத்தை நிரூபிக்க வாதி தரப்பில் போதிய ஆதாரம் இல்லையென தெரிகிறது. ஆதலால், எதிரியை கு.வி.மு.ச.255(1) பிரிவின்படி விடுதலை செய்கிறேன் "

9. Having dispensed with the personal appearance of the Appellant / Complainant, the learned Magistrate ought not to have dismissed the Complaint acquitting the accused under S.255 (1) Crl.P.C. On Complainant's absence three courses are open to Magistrate he may adjourn the case or he may acquit the accused or he may dispense with the attendance of the Complainant and proceed. It is his judicial discretion which course he would adopt. The Section invests in the Court a discretion. Hence the discretion vested in the Court should be exercised carefully and not hastily. The order should show that the wide discretion vested in the Court had properly been exercised. Dismissal of the complaint should not be adopted as a short cut method to put an end to the litigation.

10. The Nature of discretion has been widely elaborated in the Judgment of the Supreme Court in ***A.I.R. 1998 SUPREME COURT 596*** as under:-

" Two constraints are imposed on the Court for exercising the power under the S.256. First is, if the Court thinks that in a situation it is proper to adjourn the hearing then the Magistrate shall not acquit the accused. Second is, when the Magistrate considers that personal attendance of the complainant is not necessary on that day the Magistrate has the power to dispense with his attendance and proceed with the case. When the Court notices that the complainant is absent on a particular day the Court must consider whether personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reason. If the situation does not justify the case being adjourned the Court is free to dismiss the complaint and acquit the accused. But if the presence of the complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of the power envisaged in the section. The discretion must, therefore, be exercised judicially and fairly without impairing the cause of administration of criminal justice ".

10. Simultaneously there cannot be an order of

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dispensation with the attendance of the Complainant and also acquittal of the accused. It is to be noted that in this case neither the Complainant was examined nor evidence was adduced by the Complainant. Recourse to S.255 Crl.P.C. can be heard only upon taking the evidence referred to in S.254 Crl.P.C. and such other evidence ... Order of acquittal in summons case can be passed only after taking evidence referred to in S.254 Crl.P.C. Any acquittal without taking evidence referred to in S.254 Crl.P.C. is not justified. The impugned order acquitting the Respondent / Accused under S.255 (1) Crl.P.C. suffers from serious infirmity; this is all the more so, when that order was passed in the absence of the Complainant when his personal appearance has been dispensed with by the Court by allowing the petition filed under S.256 Crl.P.C. The learned Magistrate ought to have afforded opportunity to the Complainant to adduce the evidence. The dismissal of the Complaint under S.255 (1) Crl.P.C. suffers from serious infirmity and the same is to be set aside.

11. Therefore, the Order of the IX Metropolitan Magistrate, Saidapet, Chennai in C.C.No.7084 of 1996 made on 17.10.1997 acquitting the Respondent / Accused under S.255 (1) Crl.P.C. is set aside and this appeal is allowed. The learned Magistrate is directed to restore the Complaint on file and afford sufficient opportunity to the Complainant to adduce evidence and dispose of the case in accordance with law. Both parties are directed to cooperate with the trial Court in speedy disposal of the case.

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To

1. The IX Metropolitan Magistrate,
Saidapet, Chennai.

2 -do-Through
The Chief Metropolitan Magistrate,
Egmore, Chennai.

+1 cc to Mr.V.Padmanabhan, Advocate in SR No.53451

+1 cc to Mr.K.Raju, Advocate in SR No.53443

Judgment
in CRL.A.No.14 of 1998

CP(CO)
SR

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